

Legal Issues in Pricing:
Protecting your Reputation and Avoiding Liability

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5th Annual Canadian National

Forum on Pricing

October 24, 2001

Toronto, Ontario

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The price of a product is often its most important selling feature. Pricing of goods and services is also the focal point of laws intended to maintain a competitive marketplace. In Canada, the primary legislation in that area is the *Competition Act*¹.

In this paper, we will discuss the main provisions of the *Competition Act* which deal with pricing. We will discuss some of the ways that pricing can cross the line between healthy competition and anti-competitive conduct, and how you can recognize when a competitor may have crossed that line. When are low prices too low? When do price incentives become discriminatory trade practices? How should prices be advertised? How do you avoid price fixing allegations?

The following provisions of the Act will be discussed in this paper:

1. Price fixing;
2. Predatory pricing;
3. Price discrimination; and
4. Price advertising.

¹ R.S.C. 1985, c. C-34.

The Competition Act – Overview

Before getting into the specific provisions of the *Competition Act*, it is useful to have an overview of competition law enforcement in Canada. The federal *Competition Act* is Canada's primary competition legislation. Its purpose is set out in the Act as follows:

“...to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.”²

The Act provides a unique regime under which proceedings can be commenced and liability found in three different ways:

1. Criminal proceedings can be commenced by the Attorney-General in the courts with large fines, imprisonment, and injunctions as possible outcomes for those found guilty;
2. Proceedings for civil “reviewable practices” can be commenced by the Commissioner of Competition in the Competition Tribunal. The Competition Tribunal has a wide discretion to make remedial orders;
3. Civil proceedings can be commenced by those who have suffered damage or loss as a result of conduct which is contrary to the criminal provisions of the Act. These can include actions commenced by competitors or ultimate customers.

Anti-competitive conduct can potentially result in findings of both criminal and civil liability, a costly result for both the balance sheet and reputation. Class actions in competition cases have also emerged in Canadian courts. Defending a class proceeding is a costly endeavour and the potential liability can be substantial.

The Commissioner of Competition is the official responsible for investigating complaints of anti-competitive conduct under the Act. In carrying out this role, the Commissioner has a significant arsenal of investigatory powers at his disposal, including the examination of witnesses, the production of documents or written return of information, and the power of search

² *Competition Act*, R.S.C. 1985, c. C-34, s. 1.1.

and seizure. Attracting the attention of a Bureau investigation can be a costly and inconvenient burden and is something to be avoided.

Price fixing – Conspiracy to Lessen Competition

Price fixing is a criminal offence under section 45 of the *Competition Act*, which reads as follows:

- 45 (1) **Conspiracy** – Every one who conspires, combines, agrees or arranges with another person
- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
 - (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
 - (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
 - (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten million dollars or to both.

When a firm tries to influence prices by agreeing with one or more of its competitors to set their prices at some minimum level or to follow a scheme of price changes as agreed between them, price fixing allegations may follow. In recent years, price fixing conspiracies have attracted increasingly punitive fines and have sparked civil lawsuits that could add to the punitive cost of such conduct.

In 1999, for example, 3 international vitamin companies were collectively fined \$80 million for their conspiracy to fix prices over a 10 year period, and 2 top level executives were individually fined for their part in the conspiracy. In addition, the conviction sparked the institution of 10 class action law suits in Ontario alone.³ The cost of litigating these lawsuits will be substantial. The cost of findings of liability could be staggering.

³ *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. Sup. Ct. J.)

The Competition Bureau continues its vigilance in price fixing cases. The latest conviction came in July with a fine of \$1.4 million against a Japanese food company.⁴ This is not a time to attract the scrutiny of the Bureau for price fixing.

An essential element of a price fixing conspiracy is that there must be an agreement; a meeting of the minds. Unilateral action on the part of one competitor will not attract liability under section 45. Canadian courts have held that “conscious parallelism”, whereby firms knowingly charge the same prices as their competitors, but without an agreement to do so, is not enough to attract liability under the Act.⁵ While an agreement is an essential element of this offence, the existence of an agreement can be proven by circumstantial evidence, such as evidence of discussions between the alleged conspirators that relate to price⁶. It is important, therefore to avoid discussing prices with your competitors.

There must also be a finding that the agreement would **unduly** limit competition in a given market. “Unduly” has been held to mean something less than the complete elimination of competition. It is the “improper, inordinate, excessive or oppressive” lessening of competition.⁷

In practical terms, in order to determine if the conspiracy could have the effect of unduly lessening competition, the courts will look at the degree to which the alleged conspirators exert market power, or the degree to which they can act independently of the market. If the parties to the agreement are found to exert some degree of market power, the courts may find that the agreement could unduly lessen competition.⁸

Once an agreement has been found to exist and sufficient market power established, the court’s focus will shift to the object of the agreement between the alleged conspirators, the

⁴ New Release dated July 30, 2001, “Competition Bureau Investigation Leads to \$1.4 million Fines in International Price Fixing Conspiracy Case,” Competition Bureau website: www.competition.ic.gc.ca

⁵ *Atlantic Sugar Refineries Co. v. Canada (Attorney General)*, (1980), 53 C.P.R. (2d) 1 (S.C.C.)

⁶ *Competition Act*, s. 45(2.1)

⁷ *R. v. Aetna Insurance Co.*, [1978] 1 S.C.R. 731 at 747 (S.C.C.).

⁸ *R. v. Clarke Transport Canada Inc.* (1995), 64 C.P.R. (3d) 289 (Ont. Gen. Div.)

manner in which the agreement was to be carried out and any other behaviour that tends to reduce competition or limit another competitor's entry into the market.⁹

In view of the severe ramifications of price fixing allegations, it is important to ensure that any discussions that you undertake with competitors, whether formal or informal, do not include discussions of pricing or other competitively sensitive matters.

In today's marketplace, strategic alliances can be very beneficial to competition in the marketplace. While the conspiracy provisions are broad in scope, the Competition Bureau has recognized the importance of strategic alliances and encourages their development within certain parameters.¹⁰ If you are unsure whether a strategic alliance crosses the line into conspiracy territory, the Bureau also offers an advisory opinion service so that businesses can have some comfort that they are on sure footing.

Predatory Pricing - When is a low price too low?

While competition laws generally encourage low prices, the exception to that principle is predatory pricing.

Predatory pricing is an offence under paragraph 50(1)(c) of the Act, which provides as follows:

50.(1) **Illegal trade practices** – Every one engaged in a business who

- (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

⁹ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 653.

¹⁰ Commissioner of Competition – Competition Act, Information Bulletin: Strategic Alliances, Online: Competition Bureau <<http://strategis.ic.gc.ca/SSG/ct00044e.html>>

The rationale for making predatory pricing illegal is that if a campaign of below cost pricing by a firm drives the competition from the market, the alleged predator is then able to recoup its losses from selling below cost by charging supra-competitive prices, to the detriment of consumers.

Usually, predatory pricing allegations involve a firm with considerable market power trying to maintain or add to that power by limiting or weakening its competition. For investigation purposes, the Commissioner of Competition uses a market share of 35% as a guideline number for determining who has considerable market power¹¹. However, market power is not an absolute pre-requisite. Even if there is little chance that a firm will recoup the costs of its pricing campaign, predation may still be found to exist, especially if there is evidence that the low prices were implemented specifically to hurt a competitor or potential competitor. Where a firm is dominant in a market, section 79 provides additional constraints on anti-competitive behaviour prohibiting conduct by a dominant firm that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially.¹²

In order to be “unreasonably low”, prices must be below some measure of the seller’s costs. There has been considerable debate as to the appropriate measure of costs for this purpose. The current approach favoured by the Competition Bureau is to look at “avoidable costs”; the costs that a firm could have avoided if it did not produce the good in question. Avoidable costs include all of the variable costs of production, together with any product specific fixed costs. They do not include overhead.

In order to avoid allegations of predatory pricing, there are a few general guidelines to consider:

- Pricing is only considered predatory when it is below some measure of the alleged predator’s cost. As such, it is wise to avoid proactively setting a price that does not cover the costs of

¹¹ Commissioner of Competition – Competition Act, Predatory Pricing Enforcement Guidelines (Ottawa: Consumer and Corporate Affairs Canada, 1992), online: Competition Bureau , <<http://stratgis.ic.gc.ca/SSG/ct01139e.html>>

¹² Commissioner of Competition – Competition Act, Enforcement Guidelines on the Abuse of Dominance Provisions, Online: <<http://stratgis.ic.gc.ca/SSG/ct02209e.html>>

production. The policy assumption behind the below cost approach is that no rational business would produce a product on which they will lose money. Of course, under normal competition, there can be perfectly reasonable business justifications for falling below the cost threshold, such as where firms are seeking to enter a market or expand, where demand is declining or growth is slower than expected, or where there is excess capacity in the market.

- It is unlikely that one isolated unreasonably low price over a limited time period will be enough for a finding of predatory conduct. The predator must be found to have engaged in a “policy” of selling products below the costs of production or at “unreasonably low” prices. A “policy” is a deliberate program of pricing throughout the market in which your competitors operate for a sufficient period of time that it is considered a price offering.¹³ As the court in one case stated: “It is not enough for a violation of this section to sell a few articles accidentally at an unreasonably low price; the selling must be as a result of a conscious decision ...”¹⁴
- Canadian cases have held that prices will not be considered predatory, even if they are below cost, when a price reduction is made to meet lower prices already being charged by a competitor¹⁵;
- The provisions only apply to sales at unreasonably low prices. This means that the lease or rental of products is not caught by the section. However, it is important to note that a sale is not restricted to situations in which money changes hands. Sales that are for “zero price” are caught, including the giving away of product at no charge or at a nominal charge or as part of the sale of other products at regular prices. Of course, such sales must also be conducted for a commercial motivation to either combat competitors or maintain market position.¹⁶

¹³ Commissioner of Competition – Competition Act, Predatory Pricing Enforcement Guidelines (Ottawa: Consumer and Corporate Affairs Canada, 1992), online: Competition Bureau , <<http://stratgeis.ic.gc.ca/SSG/ct01139e.html>>

¹⁴ *R. v. Hoffman-La Roche Ltd.* (1980), 48 C.P.R. (2d) 145 (Ont. C.A.) at 177.

¹⁵ *Boehringer Ingelheim (Can.) v. Bristol-Myers Squibb Canada* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.)

¹⁶ *R. v. Hoffman-La Roche Ltd.*, *supra.* at 179-180.

Price Maintenance

Section 61 of the *Competition Act* prohibits any attempt, either by agreement, threat, promise or otherwise, to influence upward or to discourage the reduction of the price at which anyone supplies or advertises a product. In addition, it prohibits the direct or indirect refusal to supply a product or to otherwise discriminate against a business because of a low pricing policy.¹⁷ Unlike conspiracy and most other offences under the Act, there is no requirement that such conduct have a detrimental effect on competition. The mere existence of this behaviour is outlawed by the Act. As a result, price maintenance has given rise to many criminal convictions under the *Competition Act*.

Price maintenance is viewed as detrimentally affecting competition in the marketplace because it restricts the ability of the retailer to compete on price. This, in turn, can lead to artificially higher prices for consumers and margins for retailers. In the process, it protects inefficient retailers that would not prosper in a truly competitive environment.¹⁸

A mere attempt to persuade a customer to increase its prices or to refrain from lowering them is not an offence.¹⁹ Suppliers are allowed to suggest appropriate selling prices to their customers, as long as there is no obligation to follow the suggestion and there is no suggestion from the supplier that they will try to harm the retailer if they do not follow the suggested price. It is only when persuasion becomes a formal agreement, or an attempt to coerce a customer either by threats of punishment or promises of reward, that it crosses the line into the dangerous territory that could attract allegations of price maintenance.

While section 61 does not require proof of an effect on competition, market power is still an important factor to be considered. Where the retailer or customer has numerous other options for supply of a product for example, attempts to maintain prices will not be viewed as carrying

¹⁷ *Competition Act*, supra, s. 61.

¹⁸ J. Anthony VanDuzer, "Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance," (2000-2001) 32 *Ottawa L. Rev.* 179-234.

¹⁹ *R. v. Les Must de Cartier Canada, Inc.* (1989), 27 C.P.R. (3d) 37 (Ont. Dist. Ct.)

the same degree of coercion or persuasion as when the retailer has few options, and are less likely to attract the Competition Bureau's attention.

An agreement, threat or promise need not be an overt act. Cases have held the following to constitute attempts at price maintenance:

1. A suggestion from a supplier to a retailer that it increase its prices where there was a contract that was easily terminated and where the retailer depended heavily on the supplier²⁰;
2. An agreement with retailers that they may follow other retail prices down, but may not initiate any price reductions²¹;
3. Pointing out to a customer that a supplier is entitled to cut off supply if the retailer advertises the product below cost;
4. A supplier's attempt to end a price war by obtaining an agreement from its retailers to stop the price war²²; and
5. Offering a 5% commission to a retailer on the condition that the retailer sell according to a standard set of terms which included price²³

The realities of commercial relationships with retailers mean that there are sometimes justifications for discontinuing to supply a retailer. The Act has recognized these legitimate reasons. As a result, the Act makes it clear that it is not an offence to refuse to supply a retailer where:

1. the retailer is making a practice of using a supplier's product as a loss-leader;

²⁰ *R. v. Shell Canada Products Ltd.* (1989), 24 C.P.R. (3d) 501 (Man. Q.B.), leave to appeal refused (1990), 45 B.L.R. 231 (Man. C.A.)

²¹ *R. v. Sunoco Inc.* (1986), 11 C.P.R. (3d) 557 (Ont. Dist. Co.) affirmed (1988), 28 C.P.R. (3d) 287 (Ont. C.A.)

²² *R. v. Campbell* (1979), 51 C.P.R. (2d) 284 (B.C.Co. Ct.)

²³ *R. v. Campbell* [1964] 2 O.R. 487 (C.A.)

2. the retailer is selling the supplier's product not for the purpose of making a profit but rather for the purpose of attracting customers to sell other products;
3. the retailer is engaging in misleading advertising about the supplier's product;
4. the retailer is not providing the level of service that purchasers of the supplier's product might reasonably expect.²⁴

Price discrimination

Price discrimination is an offence in section 50(1)(a) of the Act, which reads as follows:

50 (1) **Illegal Trade Practices** - Every one engaged in a business who

(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser or articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Price discrimination means charging different prices to different customers, whether other businesses or final consumers, for the same amount of the same product, where the differences in price do not reflect differences in the cost to the supplier of serving the customers. Discrimination can also occur where the same price is charged to customers who, perhaps because one is more expensive to serve than the other, should be charged different prices.

Price discrimination will be found to exist where:

- There are two or more sales of product that can be compared. Lease and the sale of services are not caught by the price discrimination provisions;
- There is a discount, rebate, allowance, price concession, or other advantage granted to one purchaser that is not available to another;

²⁴ *Competition Act, supra.*, s. 61(10)

- The persons between whom there is discrimination are purchasers in competition with one another;
- The sale to each of the competitors was of the same quality and quantity and was made at approximately the same time; and
- The discrimination amounts to a “practice” and is not merely an isolated incident.²⁵

The best way to avoid allegations of discrimination is to make sure that if a concession is open to one purchaser, the same concession is made available to all competing customers.²⁶ However, making a concession “available” to all your competing customers does not necessarily mean that you have to give the best deal to everyone who competes with one another. If a purchaser initiates negotiations, and at the end of the negotiations, a concession is agreed to, you need not offer that specific concession to all competing purchasers unless that competing purchaser asks for that concession directly. There is no obligation to offer the concession where a competing purchaser asks only for your “best deal”²⁷.

Extending a concession once to one purchaser does not require the seller to make the same concession to all purchasers for all time. Section 50(1)(a) applies to a sale of the same quantity or quality made at approximately the same time. Consider an example: In 1996, a seller negotiates a contract for a set of widgets with a preferred customer at \$1.00 per widget with an option to purchase another set of widgets at a later date at the same price. The preferred customer buys one set of widgets and then waits a couple of years and in the year 2000 buys a second set of widgets in accordance with the option. Between 1996 and 2000, other customers who compete directly with the preferred customer buy sets of widgets at \$2.00 per widget. They find out about the option price and sue for the difference alleging price discrimination. Is the seller liable? The courts have held that it would be an unreasonable interpretation of the *Competition Act* to say that if in one year a supplier offers a certain price for a product, which

²⁵ *Competition Act, supra*, s. 50(1)(a)

²⁶ Commissioner of Competition – Competition Act, Price Discrimination Enforcement Guidelines (Ottawa: Consumer and Corporate Affairs Canada, 1992), online: Competition Bureau, <<http://stratgeis.ic.gc.ca/SSG/ct01140e.html>>

²⁷ Price Discrimination Enforcement Guidelines, *supra*.

offer is accepted some time later, the supplier must make the same offer to all other prospective purchasers.²⁸

The scheme offered to one or more purchasers must also amount to a **practice** of discrimination. One sale to one purchaser on terms that are not identical to those offered to a competing customer is unlikely to meet the threshold required for a “practice”. In addition, the provision of technical assistance, tickets to sporting events and other non-monetary advantages are not caught by the Act, nor are volume based discounts.²⁹

Price Advertising

A competitive pricing strategy is usually accompanied by an effective price advertising campaign. Misleading advertising is the most common source of trouble under the *Competition Act* for businesses in Canada. It may be subject to criminal prosecution (section 52), civil proceedings by the Commissioner (section 74.01), or private action in the courts (s. 36). The Competition Bureau will generally use the civil liability section unless there is clear evidence that the firm knowingly or recklessly made a false representation to the public and the Bureau considers it to be in the public interest to seek a criminal sanction.³⁰

The primary misleading advertising provisions of the Act are sections 52(1) and 74.01 of the Act. Section 74.01 uses similar language to section 50(1), which reads as follows:

52(1) **False or misleading representations** – No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

For the most part, price advertising trouble stems from one of two practices:

1. Advertising a product at a price that is not the price at which the product is actually sold;
and

²⁸ *Hurtig Publishers Ltd. v. W.H. Smith Ltd.* (1989), 28 C.P.R. (3d) 22 (at 32)

²⁹ Price Discrimination Enforcement Guidelines, *supra*.

2. Advertising a “special price” for a product by way of a comparison (whether express or implied) either with a company’s own regular price or with competitors’ prices.

In the second category are price advertising campaigns that offer a “special” price, either by directly comparing it to a fictitious regular price or implying that the regular price is higher. Terms like “compare at”, “sale”, “special”, “value”, “regular price”, “save”, “listed at”, “list price”, and “Manufacturer’s Suggested Retail Price” should be accompanied by a comparison to the actual regular price.³¹

It is important to remember that in order to offend the Act, the advertised price must be **misleading** in some **material** way. If the use of the expression would lead a reasonable shopper to conclude that the comparison price quoted is that at which the product is ordinarily sold, either by the seller themselves or by others in the market, and it is not, then it is misleading.³² If this misrepresentation is so essential that it could affect a reasonable person’s decision to purchase, then it is materially misleading.³³

Using conditional language such as “usually up to 40% cheaper” does not automatically save an otherwise misleading statement. Whether or not a statement with a disclaimer is misleading depends on a variety of factors including:

- The degree to which a representation misleads the public without the disclaimer;
- The prominence which the disclaimer is given in the context of the entire advertisement;

³⁰ Commissioner of Competition – Competition Act, Information Bulletin: Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track Under the Competition Act. Online: <<http://strategis.ic.gc.ca/SSG/ct01181e.html#choice>>

³¹ Commissioner of Competition – Competition Act, Misleading Advertising Guidelines (Ottawa: Consumer and Corporate Affairs Canada, 1991) Online: Competition Bureau <<http://strategis.ic.gc.ca/SSG/ct01299e.html>>

Commissioner of Competition – Competition Act, Information Bulletin: Ordinary Price Claims, Subsections 74.01(2) and 74.01(3) of the *Competition Act*, Online: Competition Bureau <<http://strategis.ic.gc.ca/SSG/ct01182e.html>>

³² *R. v. Colgate-Palmolive Ltd.* (1969), 57 C.P.R. 221 (Ont. Co. Ct.)

³³ *R. v. Kenitex Canada Ltd. et al* (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.) (rev’d in part on other grounds) 59 C.P.R. (2d) 34 (Ont. C.A.)

- The degree of sophistication that the public to whom the advertisement is directed exhibits; and
- The likelihood that the audience would recognize the disclaimer.³⁴

If the advertisement compares your prices to a competitor's, it is important that reference to both the competitor's prices and your own are not misleading. When prices are compared, liability can be found even in situations where the competitor is not specifically named, if a reasonable consumer would deduce who the competitor is.

Comparing prices to your own "ordinary price", or that charged by suppliers generally, must also be done carefully. If these prices are not in fact the ordinary selling price of the product, they will offend the provisions of the *Competition Act*.

Amendments to the Act in 1999 included provisions intended to clarify the law regarding ordinary price claims. Under section 74.01, ordinary price claims are legitimate if:

- (a) a substantial volume of recent sales has occurred at the ordinary price; or
- (b) the product has recently been offered for sale in good faith at the ordinary price for a substantial period of time.³⁵

In its Information Bulletin entitled "Ordinary Price Claims", the Competition Bureau has offered further guidance on its interpretation of the misleading advertising provisions. The Bureau's view is that the "substantial volume" requirement will be met if more than 50% of sales are at or above the reference price. A "reasonable period of time" will be the twelve months prior to (or following) the making of the representation, although the period can be shorter having regard to the nature of the product. A sale made "in good faith" means that the product was openly available in appropriate quantities, where the reference price is based on sound pricing

³⁴ *Purolator Courier Ltd. v. United Parcel Service Canada Ltd.* (1995), 60 C.P.R. (3d) 473 (Ont. Gen. Div.) at 487.

³⁵ Commissioner of Competition – Competition Act, Information Bulletin: Ordinary Price Claims, Subsections 74.01(2) and 74.01(3) of the *Competition Act*, Online: Competition Bureau <<http://strategis.ic.gc.ca/SSG/ct01182e.html>>

R. v. Andre Lalonde Sports Inc. (1972), 9 C.P.R. (2d) 187.

principles (or is considered reasonable in the competitive context), was a price that the seller expected the market to validate, and was a price at which genuine sales had occurred.³⁶

Where a firm utilizes telemarketing as part of its marketing plan, additional consideration should be given to section 52.1 of the Act. It sets out required disclosures by telemarketers, including the fair, reasonable and timely disclosure of the price of a product. It also prohibits:

- offering a product at no cost, or at a price less than its fair market value in exchange for the supply of another product, where the fair market value of the first product or any restrictions on the supply of the product have not been disclosed; and
- offering a product for sale at a price that grossly exceeds its fair market value where delivery of the product is, or is represented to be, conditional on prior payment by the purchaser.³⁷

Provincial Legislation

In addition to the *Competition Act* provisions relating to price advertising, most provinces in Canada have trade practice legislation which includes sections on representations made to consumers about price³⁸. A consumer, in this context, is limited to the ultimate consumer.³⁹ In Ontario, that legislation is the *Business Practices Act*, R.S.O. 1990, c. B.18.

As with the *Competition Act*, the *Business Practices Act* (BPA) allows both quasi-criminal and civil causes of action. In addition, it allows a range of remedies in addition to damages, such as rescission of the transaction. The BPA also gives significant investigatory and administrative powers to the agency responsible for enforcement, including the ability to obtain a search and seizure order and the power to order the practice to stop.⁴⁰

³⁶ Commissioner of Competition – Competition Act, Information Bulletin: Ordinary Price Claims, Subsections 74.01(2) and 74.01(3) of the *Competition Act*, Online: Competition Bureau <<http://strategis.ic.gc.ca/SSG/ct01182e.html>>

³⁷ Commissioner of Competition – Competition Act, Information Bulletin: Telemarketing – section 52.1 of the *Competition Act*, Online: <<http://strategis.ic.gc.ca/SSG/ct01180e.html#price>>

³⁸ See for example the *Business Practices Act*, R.S.O. 1990, c. B.18.

³⁹ *Business Practices Act*, supra, s. 1.

⁴⁰ *Business Practices Act*, supra., ss. 6, 11(4).

The BPA allows prosecution for unfair business practices, (including a false, misleading or deceptive consumer representation) or an unconscionable consumer representation made in respect of a particular transaction. In relation to the price of a product, the legislation defines a false, misleading or deceptive consumer representation as including a representation that a specific price advantage exists, if it does not.

An unconscionable consumer representation in relation to price includes those transactions where a price grossly exceeds the price at which similar goods or services are readily available to like consumers.⁴¹ The courts have held that in order to be considered an unconscionable price representation, the mere fact that the price exceeds prices for similar goods is not sufficient to convict. There must be an examination of the facts surrounding the transaction to determine whether such conduct is indeed classifiable as unconscionable.⁴² Unconscionable activities are limited to those situations where the company is taking advantage of consumers who are not able to judge for themselves the fairness of the price.

Although prosecutions under trade practices legislation have not been as common as those pursuant to the *Competition Act*, they are an additional potential source of liability when a supplier is making price representations to the general public.

Some recommendations

(a) Avoiding Liability

Survival in a competitive market requires creativity and innovation in setting and advertising prices. This innovation usually benefits the market. However, in attempting to enhance your own competitive position, it is important to remember the ways in which pricing can cross the line into anti-competitive conduct.

⁴¹ *Business Practices Act*, supra., s. 2.

⁴² *Memorial Gardens Ontario Limited v. Ontario* (1992), 6 O.R. (3d) 720 (Ont. C.A.)

There are a few universals:

- Make sure that the prices you set are not in collusion with other competitors;
- In trade association meetings, or in other contacts with competitors, do not discuss pricing or other competitively sensitive matters;
- Be cautious about any attempts to influence the price that others charge for your product. They must not constitute coercion;
- Make sure that any representations that you make about price are based on the realities of the market in which you operate, including realistic price comparisons;
- Avoid pricing your products at prices that do not cover the avoidable cost of production;
- If in doubt, contact your competition counsel. If he or she is in doubt, consider obtaining an advisory opinion from the Competition Bureau;
- If you are a dominant supplier, remember that you are subject to different constraints than if you are an emerging competitor.

(b) Responding to the Anti-competitive conduct of others

In addition to being vigilant not to cross the line into anti-competitive conduct, it is important to remember that competition laws can protect you from anti-competitive conduct by others. Section 9 of the *Competition Act* provides for a formal, six-resident complaint to be filed with the Commissioner, on receipt of which the Commissioner is obliged to conduct an inquiry. Complaints can lead to criminal prosecutions under the Act, to proceedings before the Competition Tribunal, and potentially to the cessation of the conduct.

In addition, section 36 of the Act provides for civil actions in the courts for damages resulting from anti-competitive conduct contrary to the criminal provisions of the Act. While section 36

refers only to damages, courts have held that injunctive relief can also be available in appropriate circumstances.⁴³

For a more detailed discussion of remedies for anti-competitive conduct, see Houston et al, "Private Remedies for Anti-Competitive Conduct", Canadian Bar Association, 1998.

⁴³ *Mead Johnson Canada v. Ross Pediatrics* (1997), 31 O.R. (3d) 237 (Gen. Div.)